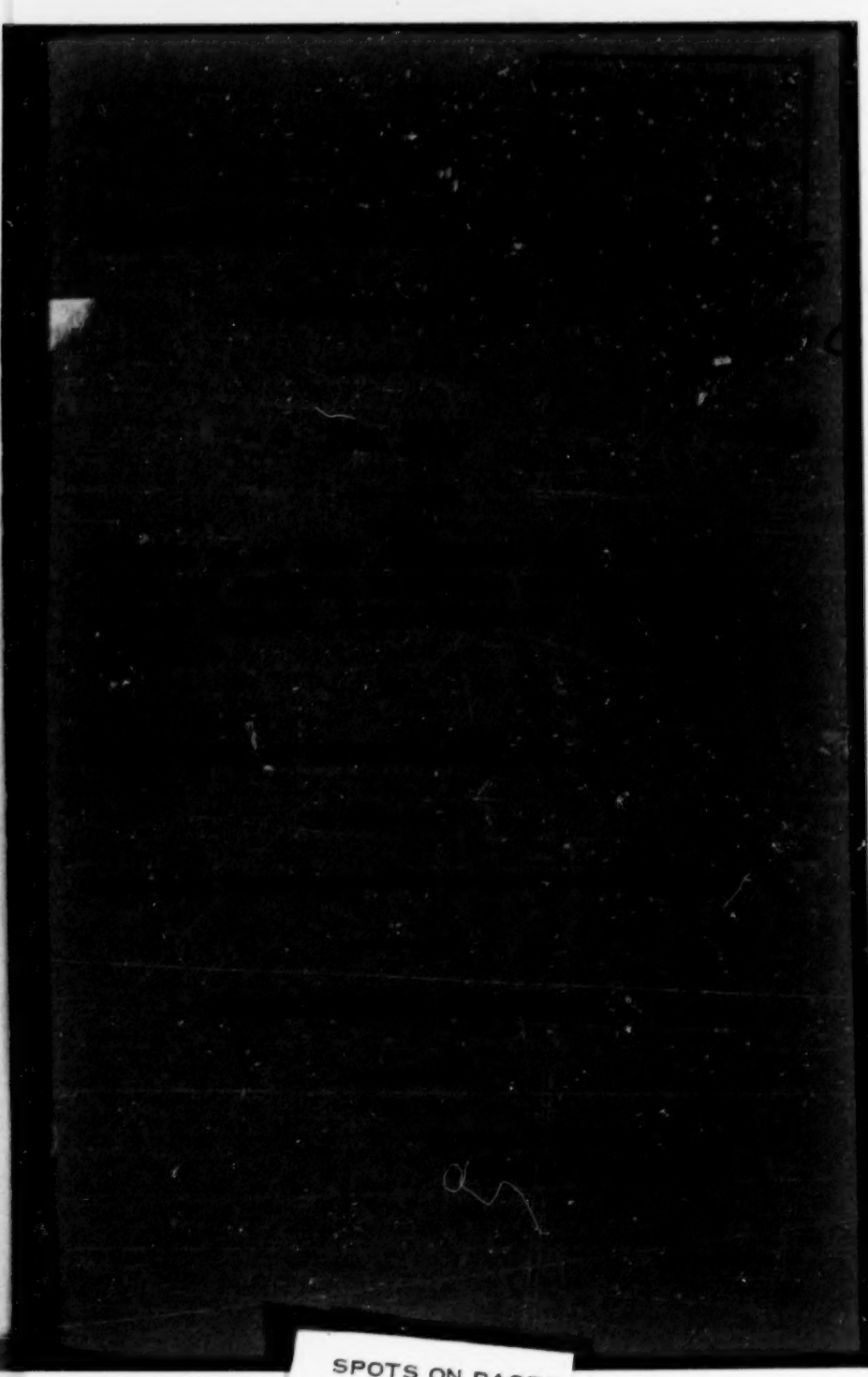
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA; PATRICK McINTYRE, INDIVIDUALLY AND AS PRESIDENT OF SAID DIVISION 26; ROBERT HOLLOWAY, INDIVIDUALLY AND AS VICE-PRESIDENT OF SAID DIVISION 26; WALTER STANLEY, INDIVIDUALLY AND AS BUSINESS AGENT OF SAID DIVISION 26; JOHN FRANCIS, INDIVIDUALLY AND AS SECRETARY-TREASURER OF SAID DIVISION 26; IVOR E. MULLINS, INDIVIDUALLY AND AS SERGEANT-AT-ARMS OF SAID DIVISION 26; GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, INDIVIDUALLY AND AS BOARD MEMBERS OF SAID DIVISION 26,

Appellants,

vs.

CITY OF DETROIT, A MUNICIPAL CORPORATION, BY AND THROUGH FRED P. SISSON, RODNEY BAXTER AND HERMAN L. MOEKLE, AS AND CONSTITUTING THE BOARD OF STREET RAILWAY COMMISSIONERS OF THE CITY OF DETROIT,

AND

UNITED D. S. R. EMPLOYEES LOCAL 312, C. I. O., AFFILIATED WITH GOVERNMENT CIVIC EMPLOYEES ORGANIZING COMMITTEE, C. I. O., AN UNINCORPORATED VOLUNTARY ASSOCIATION, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., AN UNINCORPORATED VOLUNTARY ASSOCIATION

JURISDICTIONAL STATEMENT

Jurisdictional Statement

For Jurisdictional Statement, pursuant to Rule 12(1) of the Rules of this court, as amended, defendants-appellants say:

Opinions Below

The opinion of the Supreme Court of Michigan was rendered January 7, 1952, and is to be found in 332 Mich. 237. Appendix A attached hereto is a copy thereof.

In the trial court this cause was tried contemporaneously with a similar proceeding brought by a citizen and taxpayer, one Avern Cohen. The trial court rendered separate opinions in each case and both opinions are appended hereto, because the opinion in this case refers to and partially incorporates the other.

The Opinion in the Cohen case (R. 468-472) is Appendix B attached hereto, and the Opinion in this case (R. 461-467) is Appendix C.

The Cohen case was appealed to the Michigan Supreme Court and has not been there brought on for hearing. It does not figure in this appeal.

Jurisdiction

The cause is one wherein is drawn in question the validity of a statute of the State of Michigan on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. Jurisdiction is claimed under Act June 25, 1948, c-646, 62 Sta. 929, Title 28 U. S. C. 1257(2).

The Decree of the Supreme Court of Michigan was entered March 14, 1952, and petition for appeal presented

to the Chief Justice of that Court on May 22nd, 1952, and consideration thereof declined. See order of that court accompanying. It is therefore presented to a Justice of this Court, May 27th, 1952. Timeliness is claimed under Act June 25, 1948, c. 646, 62 Sta. 961, Amended May 24, 1949, c. 139, Sec. 106, 63 Sta. 104, Title 28 U. S. C. 2101(c) which allows 90 days after entry of the decree.

State Statute Involved

The "Hutchinson Act," Act 336, P. A. Michigan 1947, Michigan Compiled Laws 1948, Sec. 423.201 et seq., M. S. A. 17.455(1) et seq., prohibits strikes by public employees as defined in the Act, and imposes "disciplinary action" and "penalties" for striking. Appendix D hereto attached is a copy thereof, and it appears in the Record, p. 456, et seq.

The Title and pertinent sections thereof are as follows:

> "An act to prohibit strikes by certain public employees to provide certain disciplinary action with respect thereto; to provide for the mediation of grievances, and to prescribe penalties for the violation of the provisions of this act.
>
> The People of the State of Michigan enact:
>
> • • • • • • •
>
> "Sec. 2. No person holding a position by appointment or employment in the government of the State of Michigan, or in the government of any one or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee' shall strike."
>
> • • • • • • • •
>
> "Sec. 4. Notwithstanding any other provision of law, any public employee who violates the provisions of this Act shall thereby abandon and terminate his appointment or employment and shall no longer hold such

position, or be entitled to any of the rights or emoluments thereof, including pension or retirement rights or benefits, except if appointed or reappointed as hereinafter provided."

* * * * * * *

"Sec. 5. Notwithstanding any other provision of law, a person knowingly violating the provisions of this Act may subsequent to such violation be appointed or reappointed, employed or re-employed, as a public employee, but only upon the following conditions:

(a) His compensation shall in no event exceed that received by him immediately prior to the time of such violation;

(b) The compensation of such person shall not be increased until after the expiration of 1 year from such appointment or reappointment, employment or reemployment; and

(c) Such person shall be on probation for a period of two years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body.

"Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties shall be deemed to be on strike; *Provided, however*, That such person, upon request, shall be entitled, as hereinafter provided, to establish that he did not violate the provisions of this Act. Such request must be filed in writing, with the officer or body having power to remove such employee, within 10 days after regular compensation of such employee has ceased. In the event of such request such officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this Act have been violated

by such public employee, in accordance with the law and regulations appropriate to a proceeding to remove such public employee. Such proceedings shall be undertaken without unnecessary delay. The decision of such proceeding shall be made within 10 days. In the event that the employee involved is held to have violated this law and his employment terminated he shall have the right to review by way of petition to the Labor Mediation Board, as provided for in Section 7 of this Act.

"Sec. 7. Upon the request of a majority of any given group of public employees evidenced by a petition signed by said majority and delivered to the labor mediation board, or upon request of any public official in charge of such employees, it shall be the duty of the labor mediation board to forthwith mediate the grievances set forth in said petition or notice, and for the purposes of mediating such grievances, the labor mediation board shall exercise the powers and authority conferred upon said Board by Sections 10 and 11 of Act No. 176 of the Public Acts of 1939."

Questions Presented

We claim that a basic vice of the Hutchinson Act is that it imposes the "disciplinary action" and "penalties" without judicial hearing. It operates directly upon public employees, and by striking they "thereby" incur penalties. By "judicial hearing" we do not mean necessarily a hearing in any established court, but use the term as comprising a hearing of judicial nature (a) before any *impartial tribunal*, (b) that has power to *hear* and (c) to *determine* the controversy.

In our assignments of error in this court, briefly stated, we claim:

(1) The Act is repugnant to the due process of law clause of the 14th Amendment of the Constitution of the United States;

(2) It is repugnant to the equal protection of the laws clause of the same amendment;

(3) It is a Bill of Attainder in violation of Art. I, Section 10, United States Constitution.

Controversy

1. Background: The City of Detroit owns and operates a public transportation system, and its supervision and direction is vested in a Commission of three, appointed by the Mayor of the City, and whose acts are subject to his supervision (R. 3-4). This Commission and the individual members, and the City are the plaintiffs-appellees.

The Commission employs its own bus and streetcar operators, some 3800 in number (R. 72). They are under the Civil Service provisions of the City Charter (R. 463). These comprise defendants-appellants' Union, and the individual defendants-appellants are officers and executive board members of the Union (R. 2-3).

For many years the city and the Union had annually negotiated a contract governing wages, hours and conditions of labor (R. 73-74). These contracts have run generally from April 1st to March 31st, and customarily negotiations for a new contract began before the prior one expired (R. 139). (Three of these annual contracts are exhibits in the record, bound between pages 386 and 387, as Exhibits B-1, B-2 and B-3, covering the period between April 1st, 1948, to March 31st, 1951). Under a provision in the contract allowing opening of the matter during its life, the Union officials approached the Mayor in February 1950 to negotiate for an increase in wages, but were persuaded to delay (R. 131, 139). Negotiations did take place in October or November 1950, however resulting in an hourly increase of 7½ cents and some additional sick benefits (R. 135, 136).

During these negotiations, a strike vote was taken by the Union membership. The City attorneys were discovered in the act of applying for an ex parte injunction and were frustrated when counsel for the Union was notified (R. 136, 208).

By letter dated March 5, 1951, the Union asked for negotiations to commence for a new contract (R. 229-30, 237). A negotiating committee on behalf of the city was set up and negotiations began (R. 142, 162, 261, 262, 336, 348). The union demanded an hourly increase of 15¢ (R. 139, 140, 141, 311 and 312), which was later lowered to 8½ cents hourly (R. 279-280, 312, 313, 359). The Mayor stood throughout on a proposition of five cents hourly increase if the Union would give up certain fringe benefits (R. 143, 177, 315, 320, 353), which the Union would not accept, claiming the fringe benefits had all been obtained by trading something of value and such was no increase at all (R. 210, 276, 292, 293, 310, 315, 317, 320).

As the negotiations continued, the State mediation officials offered their services (R. 167-168) as did a Federal Conciliator unofficially (R. 156). Both were rejected by the Mayor (R. 154, 155, 173, 190, 356, 357), though the Union was willing to mediate (R. 170, 174, 186, 190). Agreement could not be had as to arbitration (R. 343), and on April 17, 1951, the Union voted against arbitration and reposed authority in their Executive Board to call a strike (R. 74, 138, 160, 161, 325-326, 343, 354).

However the mediators obtained consent of the parties to attend a meeting arranged for 7:30 P. M. April 20, 1951 (R. 175, 294, 323). Shortly before the appointed time, a representative of the city notified the mediators that they would not attend, lacking authority (R. 156, 175, 190, 231, 295, 323). The Executive Board fearing another ex parte injunction (R. 208), called a strike, which began the next day, April 21, 1951, at 4:00 A. M. (R. 323). Negotiations

continued after the strike started but the men would not return to work under the penalties of the Hutchinson Act (R. 196, 267, 271, 298, 318).

The Union claimed that the Mayor and other officials had repeatedly threatened application of the Hutchinson Act during negotiations (R. 138, 143, 152, 154, 157, 181, 194, 265, 266, 357), though the Mayor testified that he did not mention the Act until after the strike had started (R. 353). The Union had received legal advice that the Act is unconstitutional before the strike.

The strike continued for 59 days, until after trial of this litigation, started by the city and the Commission. When the trial court rendered its opinion June 12, 1951, (R. 461-472), it held that the city had stopped the steps leading to mediation and therefore should give to the employees an opportunity to return to work "as of the time when negotiations were broken off" (R. 467). Officers of the Union publicly announced that they were willing to comply therewith, and on June 18, 1951, the Union adopted a resolution "that the members of Division 26, return to work under Judge Ira W. Jayne's Opinion (R. 431-432).

2. Proceedings in the Trial Court: While the strike was in progress a bill of complaint was filed in the Third Judicial Circuit of Michigan by the City and the Commission as plaintiffs May 18, 1951 (R. 2-19), praying for injunctive relief (R. 17-18), and for a declaration of rights as follows (R. 18):

> "5. That this court determine and decree that Act 336 of the Public Acts of 1947, commonly known as the Hutchinson Act, is valid and constitutional and that the same is applicable to the Department of Street Railways."

The bill was planked upon the Hutchinson Act, which it quotes and refers to in considerable detail in paragraphs XI to XV inclusive (R, 7-10).

Defendants, these appellants, filed answer June 1, 1951, (R. 21-42) and one paragraph was amended June 5, 1951 (R. 55-61). The answer as amended sets up that the failure of the transportation system to operate at a profit is due to mismanagement, that the Hutchinson Act does not apply to its employees since they did not come under its definition of "public employees", they not being engaged in a governmental activity but rather in a proprietary enterprise. The answer alleged in paragraph XV (R. 33-34):

> "These defendants further say that the said Hutchinson Act is void, and is no law whatsoever because it violates constitutional provisions as follows:
>
> (a) By depriving defendants, and members of Division 26, of the right to contract, violates the due process of law clauses of the Constitution of the United States, and of the Constitution of the State of Michigan, being the 14th Amendment to the Constitution of the United States, and Article II, Section 16 of the Constitution of the State of Michigan.
>
> (b) It violates the due process of law clauses of the 14th Amendment to the Constitution of the United States, and of Article II, Section 16 of the Constitution of the State of Michigan, by depriving the defendants of their property, being pension rights, seniority rights, and of their jobs without due process of law.
>
> (c) It impairs the obligations of a contract, contrary to Article I, Section 10, of the Constitution of the United States of America, and contrary to Article II, Section 9 of the Constitution of the State of Michigan.
>
> (d) Said Hutchinson Act is void because it is a bill of attainder, because it imposes penalties upon these defendants without any judicial hearing, contrary to Article II, Section 9 of the Constitution of the State of Michigan, and contrary to Article I, Section 10 of the Constitution of the United States.
>
> (e) Said Hutchinson Act is void because it denies the equal protection of the laws to these defendants,

contrary to the provisions of the 14th Amendment to the Constitution of the United States, and contrary to Article II, Section 1 of the Constitution of the State of Michigan."

Attached to the answer was a motion to dismiss the bill of complaint (R. 42) which was amended June 5, 1951, the amended motion being based on the following grounds (R. 62):

"1. That the bill of complaint alleges no equity.

2. That the Hutchinson Act upon which the said bill of complaint is planked, is void under the Constitution of the United States and the Constitution of the State of Michigan, for the reasons more specificially set forth in the defendants' answer.

3. That the Hutchinson Act is inapplicable to these defendants based upon the facts more specifically set forth in the above answer.

4. The Hutchinson Act is inapplicable to defendants for they are not public employees.

5. That the bill prays for relief with reference to the restraint of picketing and striking, which is contrary to the constitutional rights of these defendants.

6. The Hutchinson Act contains its own penalties and remedies, which are exclusive, over which this court has no equity jurisdiction."

Defendant-appellants also filed with the answer a cross-bill of complaint based upon the same claims of unconstitutionality praying injunctive relief against application of the act (R. 44-47).

The motion to dismiss was argued during the course of the trial at the close of plaintiff's case (R. 98-103) and taken under advisement by the court. It was denied in the decree (R. 473) and the cross-bill of complaint dismissed.

Two other local unions petitioned and were granted leave to intervene in this case (R. 48-54) and participated in the proceedings through the Michigan Supreme Court. They

will be served with notice of proceedings in this court as appellees, though we are informed by their counsel that they do not intend to participate in this appeal.

Trial was had before the Honorable Ira W. Jayne, one of the Judges of the Circuit Court for the County of Wayne (Third Judicial Circuit) In Chancery, from June 5, 1951 to June 11, 1951. The court filed its opinion June 12, 1951, holding therein against defendants, these appellants, on all contentions as to unconstitutionality of the Hutchinson Act. The trial court said in part (R. 461-462):

> "The controversy between the parties revolves around Act No. 336 of the Public Acts of 1947, commonly called the Hutchinson Act.
>
> The first question raised by the defendant challenges the constitutionality of the Act. We have recently held the Act constitutional in
>
> Avern L. Cohen v. City of Detroit, et al.,
> Chancery No. 475-156
>
> The findings there, we shall adopt here (See attached opinion). The Act is constitutional."

A copy of the trial court's decree is Appendix E.

3. Proceedings in Michigan Supreme Court: Claim of general appeal to the Supreme Court of Michigan was filed by the City and Commission June 26, 1951, (R. 475-476), and of general cross-appeal by the defendants, these appellants June 28, 1951 (R. 478).

Cross-appellants below, these appellants, as assignments of error in the appeal to the Michigan Supreme Court (called "Reasons & Grounds of Appeal" under Michigan practice) claimed as follows (R. 487-489)

> "1. The court erred in denying these cross-appellants' motion as amended, to dismiss plaintiffs' bill of complaint, for the reasons set forth in said motion.
>
> 2. The court erred in holding that Act 336 P. A. 1947 is constitutional.

3. The court erred in holding that Act 336 P. A. 1947 applies to the Department of Street Railways of the city of Detroit and its employees.

4. The court erred in refusing to hold that Act 336 P. A. 1947, violates Article II, Section 16 of the Constitution of the State of Michigan and the 14th Amendment to the Constitution of the United States by depriving cross-appellants of the right to contract without due process of law.

5. The court erred in refusing to hold that Act 336 P. A. 1947, violates Article II, Section 16 of the Constitution of the State of Michigan, and the 14th Amendment to the Constitution of the United States by depriving cross-appellants of property without due process of law.

6. The court erred in refusing to find that Act 336 P. A. 1947, violates Article 1, Section 10 of the Constitution of the United States and Article II, Section 9, of the Constitution of the State of Michigan, by impairing the obligations of contract.

7. The court erred in refusing to hold that Act 336 P. A. 1947, is a bill of attainder, in violation of Article II, Section 9 of the Constitution of the State of Michigan, and Article I, Section 10 of the Constitution of the United States, because it imposes penalties without judicial hearing.

8. The Court erred in refusing to hold that Act 336, P. A. 1947, violates Article I, Section 1 of the Constitution of the State of Michigan, and the Fourteenth Amendment to the Constitution of the United States, by denying equal protection of the laws.

9. The court erred in holding that cross-appellants were public employees as defined in Act 336 P. A. 1947.

10. The court erred in holding that Act 336 P. A. 1947, prevails over the Civil Service provisions of the Charter of the City of Detroit.

11. The court erred in holding that Act 336 P. A. 1947, was applicable to the Department of Street Railways of the City of Detroit, and its employees, despite the Civil Service provisions of the Charter of said City.

12. The Court erred in holding that cross-appellants are public employees."

These assignments of error were argued in briefs in the Michigan Supreme Court and also on oral argument on Oct. 5, 1951.

The Michigan Supreme Court denied all the claims of unconstitutionality, saying in its opinion, pages 252-253:

> "In view of the foregoing and, also, in accord with authorities hereinafter noted, it cannot be held, as defendants and cross-appellants contend, that by the Hutchinson Act the striking employees of Detroit's Street Railway system are subjected to a statute which violates the United States Constitution (Art. 1, Sec. 10) and the State Constitution (1908) (Art. 2, Sec. 9) prohibiting passage of bills of attainder; nor that they are deprived of rights without due process of law (United States Constitution, Fifth Amendment; State Constitution (1908) Article 2, Sec. 16,) nor of equal protection of the laws (United States Constitution, Fourteenth Amendment; State Constitution (1908) Art. 2, Sec. 1). Nor are we in accord with Cross-appellants' contention that this act impairs contractual rights possessed by employees of Detroit's Street Railway system, in violation of constitutional provisions (United States Constitution, Art. 1, Sec. 10, State Constitution (1908) Art. 2, Sec. 9). The Hutchinson Act cannot be held unconstitutional on any of the grounds just above noted."

The decree of that court provides in part:

> "It is ordered, adjudged and decreed, and this court doth hereby Order, Adjudge and Decree that Act 336 of the Public Acts of 1947, commonly known as the Hutchinson Act, is a constitutional law of this state and does not violate the United States Constitution (Article I, Section 9) and the Michigan State Constitution (Article II, Section 9,) prohibiting the passage of bills of attainder; nor the United States Constitution, Fifth Amendment and the State Constitution (Article II,

Section 16), forbidding the deprivation of rights without due process of law; nor the United States Constitution, Fourteenth Amendment, and the State Constitution (Article II, Section 1), requiring the equal protection of the laws; nor the United States Constitution (Article I, Section 10), and the State Constitution (Article II, Section 9,) forbidding the impairment of contractual rights, nor the State Constitution (Article VIII, Sections 21 to 23 inclusive), being the grant of local self-government to home rule cities."

An application for rehearing on behalf of these appellants was filed February 14, 1952 and was denied March 6, 1952 prior to entry of decree,

A copy of the Decree of the Michigan Supreme Court is attached as Appendix F.

4. We think it requires no further demonstration that the issues raised in this appeal were squarely presented in trial court and in the Michigan Supreme Court, and further that both of those courts passed directly upon them, and that it was necessary that they do so in order to reach the decision they did reach, for that court made declarations of right under the statute, and affirmed the decree of the lower court in dismissal of the cross-bill and denial of the motion to dismiss.

We shall devote little effort to show that where a statute is challenged under the Federal Constitution, a federal question is presented, and this court has jurisdiction in that respect. *Senn* v. *Tile Layers Protective Union,* 57 Sup. Ct. 857, 301 U. S. 468 (476-477) 81 Law Ed. 1229; *Tregea* v. *Board of Directors of Irrigation District,* 17 Sup. Ct. 52, 164 U. S. 179 (185) 41 Law Ed. 395.

Nor do we think there is any question that the Supreme Court of Michigan is the highest court of the State in which decision can be had. A motion for rehearing was made and denied prior to entry of decree. There can be

no further review in any state court, for under the Michigan Constitution all other courts are "inferior to the Supreme Court". Mich. Const. Art. VII, Sec. 1. It has "general supervisory control over all inferior courts." Mich. Const. Art. VII, Sec. 2. See *Smith* v. *Wayne Circuit Judge,* 64 Mich. 479. Its jurisdiction being fixed by the Constitution, it cannot be either increased or diminished by the Legislature. Application of Consolidated Safe Company 265 Mich. 345. It has "Power to review in some way all final judgments". *Schwab* v. *Coots,* 44 Mich. 463 (465).

The decision of the Michigan Supreme Court was more than a declaratory judgment, for it dismissed appellants' cross-bill of complaint and affirmed the lower court in denying their motion to dismiss, in both of which the constitutional questions here urged were directly presented. It finally decided issues and rights of the parties as presented by all parties. But had it been merely declaratory under the state statute relative to declaratory judgments, it would still possess the element of finality, for that Act applies only to "cases of actual controversy". Act 36, Michigan P. A. 1929; *Theatre Co.* v. *Moore,* 249 Mich. 673. And see: *Nashville & St. L. R. Co.* v. *Wallace,* 288 U. S. 249; 53 Sup. Ct. 345. 77 Law Ed. 730; *Railway Mail Assoc.* v. *Corsi,* 326 U. S. 88, 65 Sup. Ct. 1483, 89 Law Ed. 2072, holding that such decrees are final adjudications.

The Decree appealed from was entered in the Supreme Court of Michigan, and it leaves nothing for the lower court to do.

We think the issues were properly presented below, and that an appealable decree is presented.

Substantial Questions

1. The Hutchinson Act is more than merely regulatory of municipal activities. It is *punitive* as to the employees.

Though the Michigan Supreme Court avoids the terms in its opinion, and spoke of "limitations and regulations", the Act itself, in its title, speaks of "disciplinary action" and "penalties".

Obviously, the Act (Sec. 2) not only prohibits strikes, but by its own force goes a long way beyond. *It imposes penalties upon the employees for striking.* This is legislative exercise of judicial functions.

Under Section 4, if an employee strikes he *ipso-facto* loses his job, emoluments thereof (wages) and pension and retirement rights, unless reappointed under Sec. 5. But if he is reappointed under Section 5, *he cannot escape penalties*, for his wages can be no higher than when he struck, cannot be increased for a year, and he must be on probation for two years without tenure "at the pleasure of the appointing officer or body."

It is important that the discharge of the employees and imposition of penalties under this Statute are not the act of the employing municipality at all. They are brought about solely by the Statute itself. There is an absolute job severance and application of penalties "notwithstanding any other provision of law". By striking, the employee "thereby" loses his job and incurs the other penalties. The statute operates directly on the employees and does not merely make striking grounds for discharge, but makes it mandatory that the employer treat the employee as discharged, and unable to rehire him except subject to penalties.

We shall not assert the claim that the State Legislature may not provide penalties as to municipal employees for acts deemed inimical to public good, *but we do assert that the penalties may not be imposed by the Legislature without judicial hearing.* By applying penalties directly the Legislature transcends the legislative field.

To do so is arbitrary, and contrary to due process of law. "There are many cases which hold that removals for cause are acts of a judicial nature". *Fuller* v. *Attorney General*, 98 Mich. 95, 104.

2. *A basic vice of the Hutchinson Act is that it imposes penalties without judicial hearing.* The penalties are imposed for "wilful" striking. Sec. 6.

The act itself provides for two remedies for the employee, neither judicial in nature.

(A) Section 6 provides that the employee may apply to his employer to establish "that he did not violate the provisions of the Act," i.e., did not "wilfully" strike.

Any such hearing is not a judicial hearing for it *lacks the element of an impartial tribunal.* The employer is the opposing party in the controversy. "A familiar rule of law is that no man may be a judge in his own case." *Zimmer* v. *Supervisors*, 159 Mich. 213 (219). "We recognize that the rule of due process of law requires that the hearing which is a quasi judicial proceeding conducted by administrative officers, be before a fair and impartial tribunal." In Re: *Doyle's Application*, 312 Mich. 205 (210-211). See also: *Ames* v. *Booming Company*, 11 Mich. 139; *Milk Marketing Board* v. *Johnson*, 95 Mich. 644. Doubtless such hearing before the employer would be sufficient if the question were one of discharge by the employer. But we refuse to believe that the act is sufficient to clothe the employer with the judicial power of hearing and determining whether a penal statute has been violated.

(B) Section 7 of the Act provides for *mediation* under certain sections of the State Mediation Act—Act 176, Mich. P.A. 1939. This may be invoked under the Hutchinson Act (Sec. 7), "upon the request of a majority of any given group of employees evidenced by a petition signed by said majority," and the employer may also invoke it. The Union

is ignored—it cannot apply for mediation. The individual employee has no recourse at all under this provision, for the petition must be signed by a majority. Over and above this, *the process of mediation does not result in a determination.* The State Mediation Board can only "effect a voluntary, amicable and expeditious adjustment and settlement." Act 176 Mich., P. A. 1939. This is certainly not a judicial hearing, for the mediation board has no power to determine.

(C) All other hearings are excluded by the Act. Sec. 4 provides that, "Notwithstanding any other provision of law, any public employee who violates the provisions of this Act shall *thereby* terminate his appointment or employment". Under Sec. 6, "Notwithstanding the provisions of any other law," he shall be deemed on strike. So no additional hearing is possible. Civil Service hearings and all other hearings are excluded. And Civil Service hearings apply only to discharges by Department heads, not discharges brought about by the Legislature. *Goodfellow* v. *City of Detroit*, 312 Mich. 226.

The Supreme Court of Michigan did not hold that Civil Service hearings might be invoked, nor has it ever been so claimed by anyone. In addition, Civil Service, under the Detroit City Charter, provides for no hearing on the issues presented under the Hutchinson Act. See *Goodfellow* v. *Detroit* (*Supra*).

It is important too that these employees are subject to and enjoy Civil Service. They may be removed only for cause, and are but for the Hutchinson Act, entitled to a hearing before the Civil Service Commission to review their discharge, and it will be invalidated if for any reason other than the good of the service or if for religious or political reasons. *Goodfellow* v. *Detroit Civil Service Commission*, 312 Mich. 226, Charter Title IV, Ch. II, Section 18 (R. 463, 72).

The Hutchinson Act, since it operates to sever an employee from his job and to impose other penalties, is penal in nature. *Attorney General* v. *Bairley*, 209 Mich. 120, *Dullam* v. *Willson*, 53 Mich. 416; *Metevier* v. *Therrien*, 80 Mich. 187, *Huntington* v. *Attrill*, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123. It cannot be applied "without due process of law; 'and this requires notice to the party, a hearing, and determination' " *Metevier* v. *Therrien*, 80 Mich. 187 (190).

And in addition to the penalties above mentioned, the *Hutchinson Act interferes with the employees' right to contract.* If, after a strike, the employees are reappointed under Sec. 5 (as they were deemed to be in this case) they may not have an increase in wages for a period of a year. Obviously their right to contract—to bargain for and sell their services for such price as they can get, is curtailed to that extent. But under the Hutchinson Act, after striking, the employee cannot bargain with his employer, or contract as to wages, hours, increase or conditions of labor.

The Michigan Supreme Court held that this was no constraint of any kind on the employees, but only on the municipality. To us this seems grasping at the shadow instead of the substance. If the City cannot bargain and contract with its employees, neither can the employees bargain and contract with the city.

The right to contract is protected by the due process of law clause. *Algeyer* v. *La.* 165 U. S. 578, 17 Sup. Ct. 472; 41 L. Ed. 832 (835-836); *Estate of Meredith*, 275 Mich. 278 (290); *Kuhn* v. *Common Council*, 70 Mich. 534.

The right to work, to pursue any ordinary occupation and to earn a living are rights protected by the applicable constitutional provision as liberty and property. *Butchers Union etc.* v. *Crescent City etc.* 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585; *People* v. *Victor*, 287 Mich. 506, *Caroline Products Co.* v. *Thompson*, 276 Mich. 172.

We have read the more recent decisions of this court relative to "right to work" and "closed shop", and upholding legislative power to fix prices, wages and hours. But we think the law is yet clearly that due process of law protects the right to contract—the right of the worker to bargain and sell his labor in an unfettered market, and is also a barrier to legislative judgments inflicting penalties.

> "Creating a right or conferring it on one when not already vested in another, is legislation. So prescribing the duties of officers, their qualifications, their fees, their powers, *and the consequences of a breach of duty, including punishment and removal,* are all political regulations, and fall *within the legislative province. But to inflict those punishments, after finding the default, is to adjudge,* and to do it without default is equally so, and still more, indefensible.
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> * * * * * * *
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> "*In reference to the infliction of punishment* and divesting of the rights of property, it has been repeatedly held in this state, and it is believed in every other of the union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that *such legislative acts as profess in themselves directly to punish persons,* or to deprive the citizen of his property, *without trial before the judicial tribunals* and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, *are not effectually 'law of the land', for those purposes.*"
>
> *Hoke* v. *Henderson,* 15 N. C. 1, 25.

"But it is not to be supposed that these legislative powers are so absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every Act, legislative in form, that is law. Law is something more than mere will exerted as an act of

power. It must be not a special rule for a particular person or a particular case, but in the language of Mr. Webster in his familiar definition, '*The general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.*' So that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society, 'and thus *excluding* as not due process of law, Acts of confiscation, Acts reversing judgments and acts directly transferring one man's estate to another, legislative *judgments and decrees and other similar special, partial and arbitrary exertions of power under the forms of legislation.* Arbitrary power enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.''

Hurtado v. *People of California,* 110 U. S. 516, 535, 536, 4 S. Ct. 111, 28 L. Ed. 232.

Authorities could be vastly multiplied. The *principle* is elementary. "No such arbitrary power can exist where the principles involved in due process of law are recognized. *Yamataya* v. *Fisher,* 189 U. S. 86, 101, 23 S. Ct. 611, 47 L. Ed. 721.

We think that the Hutchinson Act violates the due process of law clauses of the 14th Amendment under most elementary principles by imposing penalties and restricting the rights of contract without hearing of any judicial nature. The Statute operates as a legislative judgment or decree.

3. We think the Hutchinson Act is repugnant to the equal protection of the laws clause of the Fourteenth Amendment.

Fundamentally, as the Hutchinson Act is applied in this case at least, it is the employees who are classified. It is not the enterprise. Those persons who are employed by municipally owned public utilities are carved out of the larger class of all public utility employees, and made subject to the Act while the larger class is excluded.

In order to make this sub-classification a reasonable basis must be found. We think no reasonable basis exists, whereby equal protection of the laws is denied.

The Michigan Supreme Court found a basis in "the necessity to administer public affairs", and to administer "efficient government."

But the operation of the street railway system of Detroit is no part of the municipal government. There is no relation at all between the operation of the system and the municipal government. In operating a public transportation system, the city is not governing its people. We must distinguish between "public" affairs and "governmental" affairs. (In perusal of a considerable number of authorities, we are impressed that lack of clear use of terms tends to confuse the issue; or perhaps evidences confusion about the issue.) Any public utility is a "public" affair, but mere municipal ownership does not make it "governmental". In engaging in the operation of this street railway system, the city of Detroit is engaging in business, not in government. When a governmental agency does this, "it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and in the business which is to be transacted." *Bank of the United States* v. *Planters Bank of Georgia*, 9 Wheat 904, 907, 6 L. Ed. 244.

That the City of Detroit in operating the public transportation system is engaged in a proprietary enterprise, a business, as distinguished from government, admits of no doubt. The Supreme Court of Michigan does not specifically discuss the point, though we think it is tacitly admitted in the opinion. But the City Corporation Counsel

has advised the Department of Street Railways July 15, 1940 (R. 441):

> *"The business of the Department of Street Railways is not a governmental function but is purely a proprietary function of the City of Detroit,* its operating expenses are not maintained in any respect by general taxation, but as provided in the Charter it derives its sole income from the revenues of the system. *In the inquiry at hand, the governmental powers of the City by which it regulates and controls its inhabitants in a sovereign capacity is not involved, and the question relates only to the proprietary or business powers of the city.* This power of the Department of Street Railways is fully recognized in the Charter provisions wherein it is stated that *the business of transportation shall be conducted by the Board as fully and completely as if said Board represented private owners."*

Fire Departments and Police Departments of municipalities cited as illustrative by the Michigan Supreme Court, are not illustrative at all. Fire departments (*Powell* v. *Village of Fenton,* 240 Mich. 94) and Police departments (*Fraternal Order of Police* v. *Lansing Board of Commissioners,* 306 Mich. 68, 76-78) have been held by that court to be strictly governmental agencies. That an act of the Legislature might be constitutionally applied to employees of those departments, does not necessarily mean that it may be applied to a department of street railways, nor of any other proprietary activity of a municipality.

The Supreme Court of Michigan has very many times held under various circumstances, that in conducting a business enterprise a municipality is "governed by the same rules which control a private individual or business corporations under like circumstances." *Andrews* v. *City of South Haven,* 187 Mich. 294, 298. See *Borski* v. *Village of Wakefield,* 239 Mich. 656; *Sykes* v. *Village of Portland,* 177 Mich. 290; *Hodgens* v. *Bay City,* 156 Mich. 687; *Watson* v. *Bay City School District,* 324 Mich. 1; *Taylor* v. *Road Com-*

missioners, 297 Mich. 487. "Otherwise, it would be granting to one class engaged in private business privileges or immunities not possessed by others 'under like circumstances' . . . When a city voluntarily goes into the same commercial business as private citizens, there is no good reason why it should be given special privileges not enjoyed by others who are compelled to meet its competition." *Borski* v. *Village of Wakefield,* 239 Mich. 661.

This Court has at least twice held that for income tax purposes an employee of a proprietary agency of a political entity must be governed by the rules applicable to employees of a private enterprise. *Helvering* v. *Powers,* 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291; *S. Carolina* v. *U. S.,* 199 U. S. 437, 50 L. Ed. 261.

We are aware that a considerable number of decisions in which for various purposes—notably for taxation and licensing—the fact of municipal ownership has been held a sufficient basis of classification. But we think, on the weight of authority and sound *principle,* particularly when municipal employees rather than the enterprise in which they are employed are the real subjects of classification, the basis is not a reasonable one.

We can see no distinction between a man employed in operating a bus owned by a city, and a bus owned by a private enterprise. He certainly is not engaged in governing the people.

We think the Hutchinson Act denies these appellants the equal protection of the laws.

(4) *We think the act is also a Bill of Attainder* proscribed by the Constitution, Article I, Section 10. This constitutional provision stands, "for the proposition that legislative acts, no matter what their form, that apply to named individuals or to easily ascertained members of a group, in such a way as to inflict punishment on them without a judicial trial are Bills of Attainder prohibited by

the Constitution." *U. S.* v. *Lovett,* 328 U. S. 303, 90 L. Ed. 1252, 1259. See also: *Cummings* v. *Missouri,* 4 Wall. 277, 18 L. Ed. 356; Ex Parte Garland, 4 Wall. 333, 18 L. Ed. 366; *Pierce V. Carskadon,* 16 Wall. 234, 21 L. Ed. 276; In Re Shorter, Fed. Cas. No. 8126; Murphy N. D. Test Oath cases, 41 Mo. 339; *State* v. *Heighland,* 41 Mo. 388; *Green* v. *Shumway,* 39 N. Y. 418; In re Young Sing Hee, 13 Sawy. 482, 36 Fed. 437; *Burkett* v. *McCarthy,* 10 Beach (Ky.) 758; *Haines* v. *Bufford,* 1 Dana (Ky.) 481; *McNeely* v. *Gregory,* 13 Fla. 417; *David* v. *Beery,* 216 Fed. 413 (reversed on other grounds, 242 U. S. 468, 61 L. Ed. 441). On this point the Supreme Court of Michigan held (332 Mich. 237, 247) that no punishment is inflicted by the Act because "It does not provide for fines or imprisonment" nor deprive the employees "of any vested right."

We do not doubt that the "disciplinary action" and "penalties" as provided in the Act are "punishment." So far as Bills of Attainder are concerned, it has never been required that the punishment amount to "fine or imprisonment" or deprivation of any "vested right."

In *U. S.* v. *Lovett, supra,* Justice Frankfurter, concurring in result but expressing the opinion that the Act of Congress there involved was not a bill of attainder, said: "The amount of punishment is immaterial to the classification of a challenged statute." Justice Frankfurter held that "punishment" must have as a prerequisite an act to be punished. This requirement is fulfilled by the Hutchinson Act.

We think *Cummings* v. *Missouri, supra,* is correct in stating 4 Wall. 277, 320; 18 Law Ed. 356:

> *"We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.'* The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law. He

does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political previously enjoyed, may be punishment; the circumstances attending and the causes of the deprivation determining this fact. Disqualifications from office may be punishment, as in cases of conviction upon impeachment. *Disqualification from the pursuits of a lawful avocation, or from positions* of trust or from the privilege of appearing in the courts or acting as executor, administrator or guardian may also, and often has been imposed as punishment."

* * * * * * *

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the *pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no way otherwise defined.*"

Cummings v. *Missouri*, 18 Law Ed. 362.

American Communications v. *Douds*, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925, cited by the Michigan Supreme Court does not discuss Bills of Attainder. Its comment as to punishment is in accord with our own views above.

Garner v. *Board of Public Works*, 341 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317, distinguishes itself from the case at bar. That decision dealt with a city charter and ordinance provision requiring city employees to file a non-communist affidavit. This court said (341 U. S. 721-722): "While the amendment deprived no one of employment *with or without trial*, yet from its effective date it terminated any privilege to work for the city in the case of persons who

thereafter engaged in the activity proscribed—*We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.*"

We think the Hutchinson Act is a Bill of Attainder.

(5) We believe substantial questions are raised. Stated at a minimum, we think the federal questions presented require "analysis and exposition," and therefore are substantial. *Milheim* v. *Moffat Tunnel Improvement District*, 262 U. S. 710, 716, 43 S. Ct. 694, 67 L. Ed. 1194. Nor do we think the question so clearly lacking in merit that upon citing any of this court's decisions, "it may be put aside." *Alton R. Co.* v. *Ill. Commerce Commission*, 305 U. S. 548, 550, 59 S. Ct. 340, 83 L. Ed. 344.

No statute similar to the Hutchinson Act has come to our attention save in those several states where practically identical statutes have been adopted. We are not here asserting a right to strike on the part of municipal employees. We are assuming that its prohibition is within the legislative powers of the state. But for the statute to *operate directly* upon the employees, without regard to the desires of their employer, or much less, any decision of an impartial tribunal, and impose "disciplinary action" and "penalties" for striking seems to us arbitrary, and clearly in violation of the constitutional provisions invoked.

We shall not go into statistics as to the number of public employees affected nor as to the number of political units. Several states already having adopted the law, the issues presented in this appeal are manifestly of very wide application.

Respectfully submitted,

EDWARD N. BARNARD,
Attorney for Defendants-Appellants,
Address: 905-11 Dime Building,
Detroit 26, Michigan.

Dated: May 22, 1952.

APPENDIX "A"

OPINION

Michigan Supreme Court—332 Mich. 237

STATE OF MICHIGAN, SUPREME COURT, OCTOBER TERM, 1951

Filed January 7, 1952

CITY OF DETROIT, a municipal corporation, by and through FRED P. SISSON, RODNEY BAXTER and HERMAN L. MOEKIE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiff, Appellant and Cross-Appellee,

vs.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA; PATRICK MCINTYRE, individually and as President of said Division 26; ROBERT HOLLOWAY, individually and as Vice-President of said Division 26; WALTER STANLEY, individually and as Business Agent of said Division 26; JOHN FRANCIS, individually and as Secretary and Treasurer of said Division 26; IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26; GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY MCKESSON, DAVID LATIMER, individually and as Board Members of said Division 26, JOHN DOE and RICHARD ROE, whose persons are well known, but whose names are unknown,

Defendants, Appellees and Cross-Appellants,

and

UNITED DSR EMPLOYEES LOCAL 312 C.I.O., Affiliated with Government Civic Employees Organizing Committee, C.I.O., an unincorporated voluntary association, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C.I.O., an unincorporated voluntary association,

Intervening Defendants and Appellees.

Before the Entire Bench, Except Butzel, *J.* North, *C.J.*

This litigation was started by a bill in equity filed in the Wayne county circuit court by the city of Detroit acting

through its board of street railway commissioners. Injunctive relief is prayed; also a ruling as to the constitutionality of the so-called Hutchinson Act (PA 1947, No. 336 (CL 1948, Sec. 423.201, et seq.; Stat. Ann Sec. 17.455(1), et seq.));[1] its application to Detroit's transportation sys-

[1] We note the material portions of the Hutchinson Act—PA 1947, No. 336 (CL 1948, Sec. 423.201-423.207; Stat. Ann. Sec. 17.455(1)-17.455(7)):

"An Act to prohibit strikes by certain public employees; to provide certain disciplinary action with respect thereto; to provide for the mediation of grievances; and to prescribe penalties for the violation of the provisions of this act."

Section 1 is the statutory definition of the word "strike".

"Sec. 2. No person holding a position by appointment or employment in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee', shall strike. • • •

"Sec. 4. Notwithstanding any other provision of law, any public employee who violates the provisions of this act shall thereby abandon and terminate his appointment or employment and shall no longer hold such position, or be entitled to any of the rights or emoluments thereof, including pension or retirement rights or benefits, except if appointed or reappointed as hereinafter provided. • • •

"Sec. 5. Notwithstanding any other provision of law, a person knowingly violating the provisions of this act may subsequent to such violation be appointed or reappointed, employed or re-employed, as a public employee, but only upon the following conditions:

"(a) His compensation shall in no event exceed that received by him immediately prior to the time of such violation;

"(b) The compensation of such person shall not be increased until after the expiration of 1 year from such appointment or reappointment, employment or re-employment; and

"(c) Such person shall be on probation for a period of 2 years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body."

Section 6 provides that the employee, for the purpose of showing he did not violate the provisions of this act, may have a prompt hearing before and a determination by the officer or body having power to discharge the employee and a right of review by the employee before the labor mediation board, as provided for in section 7 of this act.

Section 7 provides for mediation of grievances by the labor mediation board and the powers and duties of that board as provided by sections 10 and 11 of Act No. 176 of the Public Acts of 1939 (CL 1948, Sec. 423.10, 423.11). Sections 10 and 11 of Act No. 176 are not altered by PA 1949, No. 230, which amends PA 1939, No. 176.

tem and the employees therein, and other related controverted issues. Issues were formed by the answer of the above named original defendants and their cross-bill, to which plaintiff answered; and by the answer to plaintiff's bill of complaint filed by United DSR Employees Local 312 C.I.O., one of the above named parties who were permitted to intervene as defendants. The real parties defendants in interest are the employees in Detroit's department of street railway system, owned by the city and operated by its board of street railway commissioners. Following a lengthy pretrial hearing, incident to which there was a stipulation of certain facts, testimony was taken in open court. From the decree entered plaintiff has appealed and the original defendants have cross-appealed.

Throughout the proceedings which culminated in this litigation, the Detroit street railway employees were represented by their bargaining agent, Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America. The pending controversy primarily arose incident to the employees' demand for an increase in base pay. The immediately preceding contract between the city and these employees, by its terms, had expired. Following quite extended negotiations, and on April 17, 1951, the union took a vote of its membership on two questions, the first of which was: "Do you favor a strike?" and the second was: "Do you favor arbitration?" The vote resulted overwhelmingly in favor of the first question, namely to strike. While the foregoing vote is claimed by defendants to have been merely advisory, a strike was called which went into effect April 21, 1951. With minor exceptions, this strike caused complete cessation of the public transportation service theretofore rendered by plaintiff through its street railway department. This condition continued until the employees on June 18, 1951, returned to work under the terms of the circuit judge's opinion which was filed at the conclusion of the trial had in the interim. The decree was filed June 26, 1951.

The trial court decreed the Hutchinson Act constitutional and that it was applicable to "plaintiff and all of its employees." Defendants have appealed from these provisions

in the decree. The issue of constitutionality of the Hutchinson Act, which is challenged by the defendants and cross-appellants, is of primary importance and is first considered herein.

In reaching decision in the instant case it is essential to keep in mind that the provisions of the Hutchinson Act apply only to "public employees." And also that, as hereinafter held, the persons engaged in operating Detroit's street railway system are employees of the city of Detroit and hence are "public employees." The act is designed, as a matter of public policy, to prevent strikes by public employees (Local Union No. 876 *v.* Labor Board, 294 Mich 629) by providing that by striking such an employee "shall thereby abandon and terminate his appointment or employment," and by limiting or restricting the right of the public employer to re-employ a public employee who participated in a strike. It provides for substituting mediation in place of ordinary strike procedure, and that either party, by proper application, may obtain mediation.

A basic reason urged by cross-appellants in challenging the constitutionality of the Hutchinson Act is that it contains no provision for judicial review of rights asserted by a discharged public employee, and hence they are deprived of due process of law. However, by section 6 of the act provision is made for such an employee to have a hearing before the officer or body having power to remove such employee, and for a right of review of a holding adverse to such employee before the labor mediation board. We have held that like provisions are quasi-judicial and afford to the discharged employee compliance with his constitutional rights. In *In re Fredericks*, 285 Mich 262, a headnote reads:

> "A decision of a municipal civil service commission upon a hearing to remove an employee of a fire department for cause, not being the result of judicial action, but being at most a quasi-judicial act of an administrative tribunal, is not subject to review by the courts on appeal and an attempt by the legislature to create a right of appeal would be unconstitutional as an endeavor to foist nonjudicial functions upon the courts."

See also, *Goodfellow* v. *Civil Service Commission*, 312 Mich. 226; Local 170, *T.W.U.* v. *Circuit Judge*, 322 Mich. 332.

Cross-appellants rather strenuously also contend that this statute is unconstitutional since it is in effect a bill of attainder. We cannot so hold. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *United Steel Workers of America* v. *National Labor Relations Board*, 170 F 2d 247, 267, affirmed, 339 U.S. 382. See, also, *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716; 95 L. ed. 1317. The Hutchinson Act provides certain limitations and regulations, but it "inflicts" no punishment. It does not provide for fines or imprisonment, nor does it deprive a public employee, who has taken part in a strike, of any vested right.

We know of no constitutional provision which gives an individual the right to be employed in governmental service or to continue therein. If there is no such right then there is no constitutional inhibition of reasonable restrictions or limitations being applied thereto; and such restrictions or limitations could not be held to be in the nature of bills of attainder. See *Bailey* v. *Richardson*, 182 F. 2d 46, 63, wherein the court said:

> "But it has long been established that if the Government, in the exercise of a governmental power, injures an individual, that individual has no redress. • • •
>
> " 'As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative', and the court (in *Gregoire* v. *Biddle*, 177 F 2d 579) concluded that both upon authority and upon reason the rule laid down should be followed."

There is ample authority to the effect that public employment does not vest in such employees any fixed or permanent rights of employment. As individuals or in groups public employees may discontinue their employment, but, having done so, such public employees have no vested right to insist upon their re-employment on terms or conditions agreeable to the employees, or even without compliance

with such conditions. To hold otherwise would result in public agencies being powerless to render public service and to effectively administer public affairs; and the public would thereby be deprived of its right to efficient government. For example, if the members of a fire department or of a police department collectively refused to continue to serve except upon conditions insisted upon by them, unless their employer supinely yielded, the public, which by taxation pays therefor, would be deprived of fire or of police protection; and the right or power to exercise essential governmental affairs nullified. There seems to be ample reason and authority for holding that the right of public employees to collectively refuse to render the service for which they are employed differs in legal point of view from the right of private employees to strike, and hence the classification of "public employees" for the purpose of applicable legislation is valid.

> "The legislature may make classifications of persons, provided such classifications are based on substantial distinctions, are in accord with the aims sought to be achieved, and are not arbitrary or capricious but rest on reasonable and justifiable foundations." *People* v. *Chapman* (syllabus), 301 Mich. 584.

Among authorities with which we are in accord and which support our decision herein, are the following:

> "The question is whether or not public employees do have the right to strike. Under the common law,—and there is no question about it so far as this court is concerned,—there is no right to strike on behalf of public employees, for many reasons, some of which at least, might be paraphrased in the language of several of the decisions, that it is a means of coercing the delegation of the discretion which a public Board or public Body must exercise in its fulfillment of its duties. * * * (Citing several cases.)
>
> "It has been repeatedly stated that it is against public policy for public employees to strike. Many courts have held that a strike by public employees is against

public policy, is unlawful, illegal and may be restrained and enjoined." *Cleveland* v. *Division* 268, 41 Ohio Opinions 236, 90 NE 2d 711.

We are mindful that the foregoing quotation is from the opinion of a court of inferior jurisdiction, rather than one of last resort; but the holding therein is in accord with decisions rendered by courts of highest judicial authority.

"Congress has the power to regulate, within reasonable limits, the political conduct of federal employees, in order to promote efficiency and integrity in the public service. * * *

"The fundamental human rights guaranteed by the First, Fifth, Ninth and Tenth Amendments are not absolutes; and this Court must balance the extent of the guarantee of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by employees of the Government." United Public Workers v. Mitchell (syllabi), 330 US 75.

The case of Bailey v. Richardson, *supra*, was decided in the United States court of appeals for the District of Columbia. Three United States circuit judges sat in the case one of whom dissented from the prevailing opinion. The decision of the circuit court of appeals was reviewed on certiorari by the supreme court of the United States, and there affirmed by an equally divided court (341 US 918). A detailed opinion was not written by the United States supreme court, and therefore we quote the following from the headnotes of the decision rendered in the circuit court of appeals:

"If a federal government employee has no constitutional right to office, and executive officers have power to dismiss the employee, the fact that dismissal on ground of superiors' belief in employee's disloyalty to the federal government imposes a stigma and seriously impairs employee's future chances of making a living does not entitle employee to court review of the dismissal. * * *

"Dismissal of a federal employee in the classified civil service without trial because superiors have grounds which

to them are reasonably sufficient to believe that employee is disloyal to the government of the United States involves no rights of the employee and does not violate requirements of due process of law guaranteed by the Fifth Amendment."

In Norwalk Teachers' Ass'n. v. Board of Education, — Conn. — (decided July 31, 1951), 83 A2d 482, the court denied any right of public employees to strike, and in the course of its opinion said:

"In the American system, sovereignty is inherent in the people. They can delegate it to a government which they creat and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare."

While the case of Jeffries v. Election Commission, 294 Mich. 255, concerned rights in public office, the following statement contained therein might well be applied to one occupying a place of public employment. We quote:

"The question of property right in public office has been definitely settled in this State.

" 'A public office cannot be called "property," within the meaning of these constitutional provisions (United States Constitution, Fifth Amendment—due process, and Fourteenth Amendment—equal protection of law). If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they

are agencies for the State, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it.' *Attorney General, ex rel. Rich, v. Jochim,* 99 Mich. 358, 367."

Other decisions in this jurisdiction pertinent to the proposition that limitations or restrictions may be placed upon rights that public employees might otherwise possess, will be found in Fraternal Order v. Police Commissioners, 306 Mich. 68, certiorari denied, 321 US 784; Goodfellow v. Civil Service Commission, *supra;* State Lodge v. City of Detroit, 318 Mich. 182, certiorari denied, 332 US 818.

Because the decision in City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council, 94 Cal. App. 36, is applicable to various phases of the instant case, we quote somewhat at length from the headnotes of that case as reported in 210 P2d 305:

"Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.

"A strike which runs afoul of statute law or public policy is not entitled to legal protection and may be subject to legal restriction. * * *

"City of Los Angeles, having been lawfully empowered by its charter to furnish water and electricity to its inhabitants, is thereby performing a municipal and a public function, irrespective of whether it is acting in a proprietary or governmental capacity.

"To the extent that terms and conditions of public employment are governed by statute or charter, they are not subject to modification by contract, and concerted labor activity instigated for purpose of affecting terms and conditions is not sanctioned by law.

"Employment in public service frequently entails a necessary surrender of certain civil rights to a limited extent because of dominant public interest in unimpeded and uninterrupted performance of functions of government."

In view of the foregoing and also in accord with authorities hereinafter noted, it cannot be held, as defendants and cross-appellants contend, that by the Hutchinson Act the

striking employees of Detroit's street railway system are subjected to a statute which violates the United States Constitution (Art. 1, Sec. 9) and the State Constitution (Art. 2, Sec. 9), prohibiting passage of bills of attainder; nor that they are deprived of rights without due process of law (United States Constitution, Fifth Amendment; State Constitution, Art. 2, Sec. 16); nor of equal protection of the laws (United States Constitution, Fourteenth Amendment; State Constitution, Art. 2, Sec. 1). Nor are we in accord with cross-appellants' contention that this act impairs contractual rights possessed by employees of Detroit's street, railway system, in violation of constitutional provisions (United States Constitution, Art. 1, Sec. 10; State Constitution, Art. 2, Sec. 9). The Hutchinson Act cannot be held unconstitutional on any of the grounds just above noted.

Unconstitutionality of this act is also urged by cross-appellants on the ground that it restricts the right of employees to contract. We do not find in the act any restriction on the right of *employees* to contract. Instead, the restrictions on the right or power to contract are embodied in sections 3, 4a and 5 of the act. They are restrictions on and only on the power of the public employer to contract. The city of Detroit is merely one of the State's governmental agencies; and, subject to constitutional provisions, the State may limit or restrict the powers of such governmental agencies. City of Kalamazoo v. Titus, 208 Mich. 252.

Cross-appellants' and an intervening defendant's contention that the Hutchinson Act is unconstitutional because it transgresses Michigan's constitutional home rule provisions (State Constitution, Art. 8, Sec. 21-23), is answered by the fact that if the Detroit city charter, which authorizes the city to own and operate a street railway system, has in it provisions which conflict with the statutory law involved in this case, such charter provisions are invalid because Article 8, Section 21, of the State Constitution provides that such provisions are "subject to the Constitution and general laws of this state." Local Union No. 876 v. Labor Board, *supra.* See also, City of Kalamazoo v. Titus, *supra;* and Wood v. City of Detroit, 188 Mich. 547, wherein the headnotes in part read:

"Under the new Constitution (1908) the right of local self government granted to municipal corporations does not deprive the legislature of its authority to regulate such public instrumentalities by general enactments affecting their private governmental functions.

"No constitutional right of the corporation is infringed because the statute compels the municipality to respond in damages (workmen's compensation act) to servants who may have been injured without fault of the employer: since the legislature has the power to determine on what terms municipal corporations shall be allowed to engage in the employment of labor, if at all, the collective and individual rights of the citizens being duly preserved."

On this phase of the instant appeal cross-appellants and an intervening defendant-appellee rely very much on People v. Hurlbut, 24 Mich. 44. That case had to do only with a wholly different phase of law, and is not at all applicable to the instant case. The holding in the Hurlbut Case was to the effect that the legislature could not name or appoint the persons who should be the city's officers charged with purely local duties pertaining to the city's affairs, as is indicated by a headnote about to be quoted. No such issue is presented in the instant case.

"The legislature had no power to make the appointment of the members of the board of public works of the city of Detroit, as permanent officers for the full term, or the specific portions of such terms, provided by the act establishing such board (*3 Sess. L. 1871, p. 273*), for the respective members thereof. Permanent appointments for purely municipal purposes can only be made by municipal authority."

We are in accord with the holding of the trial judge that the employees of Detroit's street railway system are employees of the city of Detroit, and therefore are "public employees" within section 2 of the Hutchinson Act, which includes as a "public employee" any person "holding a position * * * or employment * * * in the service of any authority, commission, or board" in public service.

Conclusively these employees are in the city's service, having been so employed by Detroit's street railway commissioners, who are also city employees in charge of this street railway system, which is owned and controlled by the city of Detroit. The record on this appeal discloses that incident to acquiring and operating its street railway system the city of Detroit issued in large amounts full faith and credit bonds, and also so-called revenue bonds. In considering this phase of the case we are mindful of, but not in accord with cross-appellants' contention, that since the operation by the city of its street railway system is the exercise of a proprietary rather than a governmental function, the persons employed therein are not public employees, but instead are employees of Detroit's board of street railway commissioners, which by city charter provisions is authorized to contract for such employment.

"We have recognized that a municipality's operation of a public utility, although it may be a proprietary activity, constitutes engaging in a public enterprise for a public purpose." Wolgamood v. Constantine, 302 Mich. 384, 394.

"For the purpose of this case, the miners are employees of the Government, even though the private managers of the mines have been retained as operating managers for the Government and the regulations provide that none of the earnings or liabilities resulting from the operation of the mines are for the account or at the risk or expense of the Government." United States v. Mine Workers (syllabus), 330 US 258.

Contrary to cross-appellants' contention, it follows that the Hutchinson Act is applicable to those employed in Detroit's department of street railways.

In view of our holding herein, the injunctive relief sought by cross-appellants, which in part is that plaintiff be enjoined "from enforcing or applying or causing to be enforced or applied, Act 336 of the Public Acts of the State of Michigan for the year 1947 * * *," must be denied. And we also note that since prior to entry of decree the Detroit street railway employees returned to their employment, plaintiff-appellant is not asking for the injunctive relief

prayed in the bill of complaint filed May 18, 1951, which briefly was that defendants, their agents and employees, be restrained from participation in the then pending strike or picketing incident thereto.

Appellant's brief also presents the following questions as to which a declaratory decree is sought:

(1) "Prior to the strike, did the city have, and breach, any legal duty to mediate under the State Labor Mediation Board?"

We think this interrogatory must be answered in the negative. The Hutchinson Act, in section 7, provides the procedure by which either party to this type of a controversy may have a hearing before the State labor mediation board. In this case neither party complied with the prescribed procedure. The trial court was of the opinion that the city had breached its legal duty to submit to mediation, and accordingly decreed that: "Both parties shall resume formal mediation before the State Labor Mediation Board." Evidently the circuit judge based his conclusion in this respect on the fact that on April 20, 1951, both the State and Federal mediation representative sought to obtain the consent of both parties to this controversy to submit to mediation. In consequence Mr. Hough, who was the labor relations counsel of the department of street railways and who had taken part in negotiations between these litigants, at first agreed to meet with the Federal labor conciliator and the representative of the State labor mediation board, together with the union representatives. But, shortly thereafter and before the time set for the meeting, Mr. Hough cancelled this arrangement in the belief that he did not at that time have authority to participate in such a meeting. There had been no prior mediation, but only negotiations between the parties. Since demand for mediation had not been made by either party in the manner provided by the statute, we cannot agree with the conclusion of the circuit judge that the noted incident constituted a breach on the part of the city to submit to mediation, and therefore we are not in accord with the above noted provision in the circuit court's decree.

(2) "After the strike can, and must, the city offer and give the strikers an opportunity to return to work under the terms, conditions, rights and benefits under which they were working before they struck, and without the penalties of Act 336 P.A. 1947; so accept them; and continue to so treat them?"

In view of our conclusion that the Hutchinson Act is constitutional and applicable to the employees of Detroit's street railway system, the foregoing question must be answered in the negative.

(3) "Is it now the city's legal duty to mediate, and continue to mediate, with the returned strikers, under the State Labor Mediation Board?

While we know of no reason in law why the city might not voluntarily submit to mediation the matters involved in this controversy, under the instant record it must be held that such is not a "legal duty" of the city; but obviously mediation, if desired, may be brought about by either party by complying with the provisions of section 7 of the Hutchinson Act.

(4) "Can the city, within one year, pay the returned strikers any increase in base or hourly wage rate which would come only from its savings resulting from 'fringe' changes?"

The expression "fringe" includes payments for overtime, report and turn-in time, spread time, sick leave, holiday pay, etc. Concerning this phase of the appeal, the following is stated in the city's brief:

"Before the strike, in the negotiations, the city tried to eliminate or change some of the old 'agreement's' terms as to 'fringes' and to thereby effect a reduction or saving to the city in the gross amount of all the money or 'compensation' it was paying for operators' work. This saving the city was willing to use to increase the hourly or 'base' rate of pay. * * * The Union, always insistent on an increase in the hourly rate first, never agreed to any of these suggested 'fringe' changes, and struck."

As a matter of fact, negotiations between these parties terminated because of the controversy as to the constitu-

tionality of the Hutchinson Act, and without reaching any agreement or disagreement as to the right of the city to increase the employees' base pay by minimizing the amount heretofore expended incident to the "fringe" provisions of the former contract.

Cross-appellants in their brief concerning this phase of the record say: " * * * we fully agree with the city. We see no impediment under the Hutchinson Act." In view of the foregoing it is obvious that this interrogatory, which pertains to a matter which was not decided by the lower court, relates to a supposititious issue concerning which the record does not disclose there is disagreement between the parties. In consequence an issue for a declaratory decree in this respect is not presented. Grosse Pointe Shores v. Ayres, 254 Mich. 58; cited and quoted in School District No. 1, Fractional v. School District of the City of Lansing, — Mich. — (Decided December 3, 1951).

Neither party having fully prevailed, no costs will be awarded. A decree may be taken in this Court in accordance with our opinion herein.

APPENDIX "B"

OPINION

Trial Court—Cohn v. Detroit, et al.

No. 475,156

AVERN L. COHN, *Plaintiff*,

v.

CITY OF DETROIT, ET AL., *Defendant*

No. 475,181

CITY OF DETROIT, *Plaintiff*,

v.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, *Defendant*

OPINION—Filed June 5, 1951

I am going to dispose of Mr. Cohn's case now as I think it will perhaps serve to clear the air and enable Mr. Cohn

to take such action as he may desire to do on behalf of himself and others whom he says he represents.

I probably should have immediately taken up his lawsuit, but I thought that it was wise to try to help negotiate a fair interim arrangement to secure transportation for the public and an orderly disposition of legal questions.

In that we were so far unsuccessful, but I am still hopeful.

I have now in the record such facts as we have been able to agree upon, which have been included in the pre-trial statement and will be made a part of the record and is by reference made a part of this opinion, and I have listened to the arguments of all who want to be heard.

The first question I shall dispose of is the first question Mr. Barnard raised: Has the Court jurisdiction to entertain Mr. Cohn's case?

It is in the record that he is a taxpayer and a patron of the streetcars and busses. It is also in the record that there are many bonds pledging the full faith and credit of the City outstanding. I have just been handed a memorandum showing $32,000,000 worth of City bonds outstanding, for which the assets and income of the Street Railway System is a base, but which are further supported by faith and credit of the City.

I will dispose then of Mr. Barnard's motion to dismiss in the final decree which I am going to order in this case. I think that may enable an immediate review and a determination of this as well as the other legal issues raised in his bill of complaint.

Second: Shall the Court restrain the Mayor and the Board of Street Railway Commissioners from enforcing the terms of the Hutchinson Act so-called against the employes of the Street Railway Commission?

This would be justified if the Court thought the Act unconstitutional. We may say that we do not like the Act, and we do not like it because it is self-executing. It deprives the Court of the power constructively to work out a solution of the problem which has been brought before it.

But as Justice Holmes first said, and it has been repeated by judges passing on constitutional questions ever since, the Court does not make the law. That is solely the duty of

Legislature. They have a responsibility equal to that of the Courts. Theirs is the duty to enact the laws. Nor does it enforce the law. That is solely the duty of the Executive.

So the Court's duty in this case is to decide the legal question. The first one is as to the constitutionality of the law—the so-called Hutchinson Act. The only legal question there to decide: Was it within the power of the Legislature to enact such a law? The answer is yes.

The state or the municipality may fix the terms and conditions of public employment. We pointed this out just a few months ago at length in

Green v. City of Detroit, Our No. 453, 757.

and I noticed in the newspapers this morning that approximately the exact question passed upon there was determined by the Supreme Court of the United States yesterday and supported our position in the Green case.

We based our decision there largely on Justice Holmes in the early case of

McAuliffe v. Mayor of New Bedford, 155 Massachusetts 216.

In that case the employe was a policeman. In discussing his constitutional rights, the Court said:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

Public Service is a privilege and not a right.

The second legal question then: Should the Court restrain the Mayor from enforcing this law?

Having found that the Legislature had the power to enact the law, having found thereby that it has deprived no public employe of his constitutional right, the answer is no.

Whether or not these defendants, employes of the Department of Street Railways are public employes, we leave open. The question is not raised in Mr. Cohn's case. It is raised and will be determined in the City's case, which we shall proceed immediately to try.

Next: Shall the Court order the men back to work under the terms of the Hutchinson Act we have just found constitutional?

The only penalty is that they may be discharged. They have been discharged. The law provides the conditions on which they may return to work. The law itself gives the Court no authority to order the men back to work. In fact, it denies it.

The recent Supreme Court case of

> Amalgamated Association of Street and Coach Employees v. The Wisconsin Employment Relations Board

which we have discussed somewhat at length here, declared unconstitutional an act similar to the Hutchinson Act, different only in that the Wisconsin Act sought only to compel arbitration of the employes of public utilities and not to legislate about the employment of public employes, that being specifically exempted from the Taft-Hartley Act, so I see no confusion between this case and that.

Without the statute, the Court has no power to order an employe to return to work. It would be an invasion of his constitutional rights. Its only enforcement would be by imprisonment, which would deprive him of his right to liberty, of which he may be deprived only by due process of law.

The other question raised by Mr. Cohn to determine the City's and the employes rights to a declaratory judgment is more elaborately pleaded by both sides in the City's case against the Union and may be more equitably disposed of there.

For the reasons stated, therefore, a decree may be entered denying the plaintiff the relief sought and the Court will cooperate to facilitate an immediate appeal, Mr. Cohn.

Since the Act is in the public interest, no costs will be taxed.

IRA W. JAYNE,
Circuit Judge.

Dated: June 5, 1951.

APPENDIX "C"

OPINION

Trial Court—Division 26, etc. v. Detroit, et al.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

IN CHANCERY

No. 475-181

CITY OF DETROIT, a Municipal Corporation, by and through Fred P. Sisson, Rodney Baxter, and Herman L. Moekle, as and constituting the Board of Street Railway Commissioners of the City of Detroit, Plaintiffs,

vs.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, Patrick McIntyre, individually and as President of said Division 26; Robert Holloway, individually and as Vice-President of said Division 26, Walter Stanley, individually and as Business Agent of said Division 26, John Francis, individually and as Secretary-Treasury of said Division 26, Ivor M. Mullins, individually and as Sergeant-at-Arms of said Division 26, George Knoppe, Thomas Woof, John R. Glabas, Ralph Holman, Cornelius O'Sullivan, George Stocks, Thomas Nagle, Albert Riley, Russell Goyer, Joseph Silverthorn, Leroy McKesson, David Latimer, individually and as Board Members of said Division 26, John Doe and Richard Roe, whose persons are well known, but whose names are unknown, Defendants,

and

UNITED D. S. R. EMPLOYEES LOCAL 312, CIO., affiliated with Government Civic Employees Organizing Committee, C. I. O., an unincorporated voluntary association, and International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., an unincorporated voluntary association, Intervening Defendants

OPINION OF THE COURT—Filed June 12, 1951

The Court: I think I ought to state on the record, by reason of the fact that I am about to state my opinion in

this matter immediately after the conclusion of the arguments, that we have all been very close to this case for several days. And during the time, especially when I was working on the pre-trial statement, I heard practically all of these legal arguments develope more or less fully and have given some thought to the matter myself.

So in the interest of an early determination of this matter, and that both the parties may know what I conceive to be their rights, I am going to state now my opinion on the matter.

So much of it is in an agreed statement of facts at the pre-trial hearing that there is no point in rehearing it.

Both parties, the Board of Street Railway Commissioners and the defendant Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America and their officers, have submitted their controversy to this court of equity by bill and cross-bill. By so doing they have acknowledged the jurisdiction of the court.

The controversy between the parties revolves around Act No. 336 of the Public Acts of 1947, commonly called the Hutchinson Act.

The first question raised by the defendant challenges the constitutionality of the Act. We have recently held the Act constitutional in Avern L. Cohn v. City of Detroit, Chancery No. 475-156.

The finding there, we shall adopt here. (See attached opinion.) The Act is Constitutional.

Mr. Rothe, at the argument, just cited me this case of People in the Relation of the Board of Park Commissioners vs. The Common Council as authority for the law that the Legislature cannot pass this kind of an Act. I need only to read to him one of the head notes:

> "The compulsory authority of the Legislature of municipal corporations considered and held that as regards matters of general concern, the duties which the people of the several localities owe to the commonwealth at large in control of the state is complete, and no discretionary authority is vested in such corporations."

This is legislation affecting the public good of the whole state. In the case which he cites me, the Legislature attempted to legislate for the City of Detroit on a purely local matter applying to parks.

The next question raised is the contention of the defendants that, even though the Act is unconstitutional, they do not come under the purview of the Act.

In other words, the defendants claim that they are not public employees and cite a line of cases holding that when a municipality engages in an activity frequently performed by private individuals and in competition with them, that it is performing a proprietary function and not a public function, and therefore is governed by the laws governing controversies between individuals.

This distinction has been built up by Courts of law principally to facilitate their—that is the departments of the municipalities—making of contracts, as Judge Krause opined in the opinion that was cited to me without the red tape of the usual safeguards surrounding the acts of public officials and to facilitate holding the public authority liable for the torts of its servants in courts of law.

This rule of law does not remove the employes from the classification of public employees in their relations and responsibilities to government.

The employees of the DSR are protected by the rules of civil service. They benefit by the municipal pension system. Their relations with the City are governed by the Charter. They cannot accept the benefits of public employment and deny its responsibilities and restrictions. They come within the provisions of the Act.

And Mr. Barnard, I listened carefully, has shown me no case or authority to the contrary.

The next issue is an issue of fact requiring an analysis of the acts of the parties leading up to the break in their relations and the strike.

The court has permitted testimony, not only as to that, but also as to the actions of the parties following the strike and preceding the filing of this bill of complaint on the contention of the defendants that the plaintiffs did not negotiate in good faith.

We find that there was no bad faith in the commonly accepted meaning of the terms on either side, and therefore we hold that the testimony following the strike is material only to determine that fact.

However, the acts of the parties from the time that they began to negotiate the 1951 contract until the negotiations were broken off, require an analysis to determine the cause for the break under Section 7 of the Act, the pertinent part of which reads as follows:

> "Upon the request of a majority of any given group of public employees evidenced by a petition signed by said majority and delivered to the labor mediation board, or upon request of any public official in charge of such employees, it shall be the duty of the labor mediation board to forthwith mediate the grievances set forth in said petition or notice, and for the purposes of mediating such grievances, the labor mediation board shall exercise the powers and authority conferred upon said board by sections 10 and 11 of No. 176 of the Public Acts of 1939."

In this case it will be noted that the plaintiffs have dealt with the union, its officers and representatives, for a number of years, recognizing them as the bargaining agents; that they have brought this action against them as such, as representatives of all the members of the Union; and that they contend that all of the members of the Union are bound by the representations of these defendant officers. In fact, the plaintiff continues to recognize the Union organization as the representatives of the defendants by directing this lawsuit against them.

We have analyzed the exchange of telegrams from the records of the State Labor Mediation Board and the testimony of its commissioner, George E. Bowles. We have listened to the testimony of those who participated in these negotiations up until the time that they were broken off.

Perhaps both parties were badly advised as to the scope and meaning of the Hutchinson Act. The employees did not individually sign a petition asking for the mediation to which they were entitled under the law. Equity, how-

ever, looks to the substance rather than the form.

At no time did the plaintiff suggest a technical compliance with the provisions of the Act. They accepted the Union and its officers and representatives as the parties with whom to deal. They waived the technical compliance.

The Attorney General, in Opinion No. 662, says among other things in discussing this Section 7:

> "* * * It shall be the duty of the Board; to invite the disputants and/or their representatives to attend such conference and submit, either orally or in writing, the grievance of and differences between the disputants."

And in another place:

> "After the Board has received the above notice, or"

and he emphasizes this

> "upon its own motion in an existing, imminent or threatened labor dispute, the Board may and, upon the direction of the governor, the Board must take such steps, etc."

Whether or not the Mediation Board or the defendants took the first step in requesting mediation, is immaterial.

The exchange of telegrams fairly discloses that the defendants were ready to mediate under the provisions of the law if their rights to test the constitutionality of the Act were preserved. And it must be noted that the constitutionality of the Act has not yet been determined by a court of last resort. The plaintiffs, Board of Street Railway Commissioners, stopped the steps which were leading to a mediation under the provisions of the Act.

Mr. Hough, who describes himself as the Labor Relations Counsel of the plaintiffs, stated in answer to direct questions from his own counsel among other things, I will not take the time to read it now, after describing the plans for this meeting at 7:30 of a certain night;

> "And when it was said that I promised to go, that is true. I did promise. After talking with him, I

> immediately conferred with the three members of my committee and each of them pointed out to me that in their opinion"

and then he was interrupted. His next answer is:

> "After having consulted with the members of my committee, I called Mr. Diehl back. I believe it was within about an hour or two hours, and advised him that in my opinion we had no authority to go and that we should not go and please cancel the meeting."

In that connection, I find as a fact that the Labor Relations Counsel had been given authority and was conducting those negotiations, when this act stopped those negotiations for mediation, as had been suggested by the State Labor Mediation Board.

Equity abhors forfeitures. A minority of the employees voted against the strike. It is fair to assume that many were the older men who had the most at stake with their accumulated seniority and pension rights. To forfeit those rights without recourse does not appeal to the conscience of the court.

All the defendants have been punished, severely, already by a loss of several hundred dollars of wages each. Their representatives have repeatedly stated that they will comply with the terms of the Act when told what it is. They should be given that opportunity; that is, to return to work under the terms and conditions under which they were working when the strike occurred. The plaintiffs should accept them under those conditions and resume a formal mediation under the State Labor Mediation Board as the Act provides.

The plaintiff, Board of Street Railway Commissioners have asked for a declaration of rights.

This opinion declares not only their rights, but their obligations. They must offer the men an opportunity to return under the terms of the Act, but as of the time when the negotiations for mediation were broken off.

If that opportunity is accepted by the Union, that disposes of the matter. If it is declined, it may be necessary

for me to determine the further contention of the plaintiffs that the defendants are unlawfully interfering with their conduct of the management of their transportation system. But as of this time under this opinion, a finding on that issue becomes unnecessary.

A decree embodying the provisions of this opinion, so far as they declare their respective rights of the parties, may be prepared.

IRA W. JAYNE,
Circuit Judge.

APPENDIX "D"

HUTCHINSON ACT

Act 336, Mich. P. A. 1947; Mich. C. L. '48, Sec. 423.201, et seq; M. S. A. 17.455(1), et seq.

HUTCHINSON ACT

Act 336, 1947 eff. Oct. 11

An Act to prohibit strikes by certain public employees; to provide certain disciplinary action with respect thereto; to provide for the mediation of grievances; and to prescribe penalties for the violation of the provisions of this act.

The People of the State of Michigan enact:

Sec. 1. As used in this act the word "strike" shall mean the failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment: *Provided, however,* That nothing contained in this act shall be construed to limit, impair or affect the

right of any public employee to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment.

Sec. 2. No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.

Sec. 3. No person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike by 1 or more public employees, and such person shall not authorize, approve or consent to such strike, nor shall any such person discharge or cause any public employee to be discharged or separated from his or her employment because of participation in the submission of a grievance in accordance with the provisions of section 7 of this act.

Sec. 4. Notwithstanding any other provision of law, any public employee who violates the provisions of this act shall thereby abandon and terminate his appointment or employment and shall no longer hold such position, or be entitled to any of the rights or emoluments thereof, including pension or retirement rights or benefits, except if appointed or reappointed as hereinafter provided.

Sec. 4a. The provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply in so far as the power exists in the legislature to control employment by the state or the emoluments thereof.

Sec. 5. Notwithstanding any other provision of law, a person knowingly violating the provisions of this act may subsequent to such violation be appointed or reappointed,

employed or re-employed, as a public employee, but only upon the following conditions:

(a) His compensation shall in no event exceed that received by him immediately prior to the time of such violation;

(b) The compensation of such person shall not be increased until after the expiration of 1 year from such appointment or reappointment, employment or re-employment; and

(c) Such person shall be on probation for a period of 2 years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body.

Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties shall be deemed to be on strike: *Provided, however,* That such person, upon request, shall be entitled, as hereinafter provided, to establish that he did not violate the provisions of this act. Such request must be filed in writing, with the officer or body having power to remove such employee, within 10 days after regular compensation of such employee has ceased. In the event of such request such officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by such public employee, in accordance with the law and regulations appropriate to a proceeding to remove such public employee. Such proceedings shall be undertaken without unnecessary delay. The decision of such proceeding shall be made within 10 days. In the event that the employee involved is held to have violated this law and his employment terminated he shall have the right of review by way of petition to the labor mediation board, as provided for in section 7 of this act.

Sec. 7. Upon the request of a majority of any given group of public employees evidenced by a petition signed

by said majority and delivered to the labor mediation board, or upon request of any public official in charge of such employees, it shall be the duty of the labor mediation board to forthwith mediate the grievances set forth in said petition or notice, and for the purposes of mediating such grievances, the labor mediation board shall exercise the powers and authority conferred upon said board by sections 10 and 11 of Act No. 176 of the Public Acts of 1939.

Section 8. Any person not a public employee who shall knowingly incite, agitate, influence, coerce, or urge a public employee to strike shall be deemed to be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for not to exceed 1 year, or by a fine of not less than $100.00 nor more than $1,000.00, or both such fine and imprisonment in the discretion of the court.

APPENDIX "E"

DECREE

Trial Court

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE IN CHANCERY

No. 475-181

CITY OF DETROIT, a Municipal Corporation, by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and Constituting the Board of Street Railway Commissioners of the City of Detroit, *Plaintiffs*,

vs.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, Individually and as President of Said Division 26; ROBERT HOLLOWAY, Individually and as Vice-President of Said Division 26, WALTER STANLEY, Individually and as Business Agent of Said Division 26; JOHN FRANCIS, Individually and as Secretary & Treasurer of Said Division 26; IVOR M. MULLINS, Individually and as Sergeant-at-Arms of Said Division 26; GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, Individually and as Board Members of Said Division 26, JOHN DOE and RICHARD ROE, Whose Persons Are Well Known, But Whose Names Are Unknown, *Defendants*,

and

UNITED DSR EMPLOYEES LOCAL 312 C.I.O., Affiliated with Government Civic Employees Organizing Committee, C.I.O., an Unincorporated Voluntary Association, and INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C.I.O., an Unincorporated Voluntary Association, *Intervening Defendants*

Decree

(Filed June 26, 1951)

At a session of said court held at the courthouse for Wayne County, in the County Building, in the City of Detroit, Michigan, on the 26th day of June, A.D. 1951.

Present: The Hon. Ira W. Jayne, Circuit Judge

The above entitled cause having come on for trial and having been tried, upon the pleadings and proofs having been taken in open court, and on the facts stipulated at pre-trial hearings, the plaintiff in its bill of complaint and the defendants in their cross-bill, having each prayed for a declaration of rights as to the constitutionality and the applicability of Act 336 of the Public Acts of the State of Michigan for the year 1947, and the plaintiff also having prayed for injunctive relief and the court having filed its opinion thereon and the record having thereafter been supplemented as to events transpiring after the filing of said opinion;

It is hereby ordered, Adjudged and Decreed That:

I. Act No. 336 of the Public Acts of 1947, commonly known as the Hutchinson Act, was at the time the controversy between the parties arose and still is a constitutional law of the State of Michigan and applicable to the plaintiff and all of its employees, including the defendants; the members of Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, the members of the United D.S.R. Employees, Local 312, Local Industrial Union affiliated with C.I.O., and International Union, and the members of the United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O.

II. The plaintiff shall continue to treat the employes who have returned to their employment under the conditions as they existed prior to the time they quit that employment, and shall reinstate them with such rights and benefits as they had at the time that negotiations were broken off on, to-wit, April 20, 1951. The defendants shall

continue to work in recognition of the validity of Act 336, including its penalties, from the time of this decree.

III. Both parties shall resume formal mediation before the State Labor Mediation Board.

IV. It appearing that the parties have resumed the operation of the transportation system, plaintiff's prayer for injunctive relief is denied.

V. All other relief prayed for by the bill of complaint and by the cross-bill of complaint, which is not herein specifically granted is denied.

VI. A public question being involved, the decree is entered without costs.

IRA W. JAYNE,
Circuit Judge.

APPENDIX "F"

DECREE

Mich. Supreme Court

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Fourteenth day of March, in the year of our Lord One Thousand Nine Hundred and Fifty-two.

Present the Honorable Walter H. North, Chief Justice; Emerson R. Boyles, Neil E. Reid, John R. Dethmers, Henry M. Butzel, Leland W. Carr, George E. Bushnell, Edward M. Sharpe, Associate Justices.

CITY OF DETROIT, a Municipal Corporation, by and Through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and Constituting the Board of Street Railway Commissioners of the City of Detroit, *Plaintiff, Appellant and Cross-Appellee,*

vs.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, Individually and as Presi-

dent of Said Division 26; ROBERT HOLLOWAY, Individually and as Vice-President of Said Division 26, WALTER STANLEY, Individually and as Business Agent of Said Division 26; JOHN FRANCIS, Individually and as Secretary & Treasurer of Said Division 26; IVOR M. MULLINS, Individually and as Sergeant-at-Arms of Said Division 26; GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY MCKESSON, DAVID LATIMER, Individually and as Board Members of Said Division 26, JOHN DOE and RICHARD ROE, Whose Persons Are Well Known, But Whose Names Are Unknown, *Defendants, Appellees and Cross-Appellants,*

and

UNITED DSR EMPLOYEES LOCAL 312 C.I.O., Affiliated with Government Civic Employees Organizing Committee, C.I.O., an Unincorporated Voluntary Association, and INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C.I.O., an Unincorporated Voluntary Association, *Intervening Defendants and Appellees*

DECREE

The above cause having come on to be heard upon appeal by the plaintiff City of Detroit from the Decree of the Circuit Court for the County of Wayne, Hon. Ira W. Jayne, Presiding, and upon the cross-appeal of the original defendants and the record of the proceedings in the Circuit Court having been duly filed with this Court and briefs having been filed and the matter argued by counsel for the respective parties and this Court having heretofore rendered its opinion in this matter, which said opinion is incorporated herein by reference. Now, therefore,

It is ordered, adjudged and decreed and this Court doth hereby Order, Adjudge and Decree that Act 336 of the Public Acts of 1947, commonly known as the Hutchinson Act, is a constitutional law of this State and does not violate the United States Constitution (Article I, Section 9),

and the Michigan State Constitution (Article II, Section 9,) prohibiting the passage of bills of attainder; nor the United States Constitution, Fifth Amendment and the State Constitution (Article II, Section 16), forbidding the deprivation of rights without due process of law; nor the United States Constitution, Fourteenth Amendment, and the State Constitution (Article II, Section 1), requiring the equal protection of the laws; nor the United States Constitution (Article I, Section 10), and the State Constitution (Article II, Section 9), forbidding the impairment of contractual rights, nor the State Constitution (Article VIII, Sections 21 to 23, inclusive), being the grant of local self-government to home rule cities.

It is further ordered, adjudged and decreed that the defendants and cross-appellants, members of Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, being employees of the City of Detroit, Department of Street Railways, are public employees within the terms of Act 336 of the Public Acts of 1947 and that said Act is applicable to the plaintiff and appellant, City of Detroit, and to its employees in said City's Department of Street Railways, including the defendants and cross-appellants.

It is further ordered, adjudged and decreed that the injunctive relief sought by defendants and cross-appellants, including the prayers that plaintiffs and appellants be enjoined from enforcing or applying or causing to be enforced or applied the provisions of Act 336 of the Public Acts of 1947, be and the same is hereby denied.

It is further ordered, adjudged and decreed that Act 336 of the Public Acts of 1947 imposes no Local Duty to mediate under the State Labor Mediation Board until there has been compliance with Section 7 of said Act; that there has been no compliance with said section by the parties hereto and that prior to the strike of the employees of the Department of Street Railways, defendants and cross-appellants herein, the plaintiff and appellant City of Detroit did not have nor breach any legal duty to mediate under the State Labor Mediation Board, nor is it now, in the absence of the required compliance with Section 7 the duty of plaintiff and

appellant City of Detroit to mediate or continue to mediate with the strikers under the State Labor Mediation Law.

It is further ordered, adjudged and decreed that after the strike the plaintiff and appellant City of Detroit was under no legal duty to re-employ or reappoint its former employees who struck in violation of the terms and conditions of Act 336 of the Public Acts of 1947, nor could the said city reappoint or re-employ said former employees except under the conditions set forth in Section 5 of said Act.

It is further ordered, adjudged and decreed that no issue for a declaratory decree is presented as to the proposition that substituting increases in base pay for fringe payments costing a comparable amount of money is not an increase in compensation as defined by Act 336 of the Public Acts of 1947.

It is further ordered, adjudged and decreed that the decree of the Circuit Court for the County of Wayne is hereby modified in accordance herewith.

It is further ordered, adjudged and decreed that no costs will be awarded.

(2930)